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AUG 6 1969
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No. 315

In the Supreme Court of the United States

OCTOBER TERM, 1969

ROBERT D. HAYES, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. 25–35) is reported at 408 F. 2d 932. The memorandum findings of fact and conclusions of law entered by the district court (R. 146–150) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1969. A petition for rehearing was denied on April 7, 1969. The petition for a writ of certiorari was filed on July 5, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

359-155—69

QUESTIONS PRESENTED

1. Whether the district court abused its discretion in denying petitioner's request for a continuance to permit further discovery.

2. Whether the district court committed prejudicial error in entering an order striking petitioner's affirmative defenses.

STATEMENT

After a hearing (R. 158–225)[1] on the Government's petition (R. 6–13) to enforce Internal Revenue Service summonses, the district court found (R. 146–149) that the evidence sought was necessary for a determination of the tax status and liability of Americans Building Constitutionally, a trust created under the laws of Illinois (hereafter referred to as ABC). The district court therefore ordered the three trustees of ABC to comply with the summonses served on them pursuant to Section 7602 of the Internal Revenue Code of 1954 and ordered petitioner, one of the trustees, to produce the ABC records (R. 150–151).

On appeal by petitioner, the court of appeals noted that the order was strongly supported by the evidence and that petitioner did not contend otherwise (Pet. 27, 31). The court of appeals also noted (Pet. 31), despite petitioner's answer alleging that ABC is a tax exempt non-profit educational trust (R. 21), that ABC's declaration of trust (R. 23–33) authorized its trustees to carry on almost any kind of business and distribute the proceeds and income in their discretion, to distribute assets to beneficiaries upon final

[1] "R." references are to the appendix filed by petitioner in the court of appeals.

liquidation, and did not prohibit operation for profit or require or authorize educational activity. The court of appeals further noted (Pet. 31) that the record indicated (R. 355) that ABC was engaged in promoting throughout the United States, for fees of $1,000 to $15,000, the establishment of not-for-profit groups and trusts the purpose of which was non-payment of federal income and inheritance taxes.

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 8–19) that it was a denial of due process for the district court to deny his request for a continuance so that he could take the depositions of the Commissioner and other officials of the Internal Revenue Service and file a motion for production of additional documents. The request for this postponement was made orally at the time the hearing commenced, some six weeks after the petition to enforce the summonses had been filed (R. 160).

Petitioner had already taken the deposition of the investigating agent, Alan D. Cornue (R. 230–328). The matters which petitioner desired to explore by further discovery were pursued by petitioner in cross-examining Agent Cornue at the enforcement hearing, and the district court sustained the government's objections to the relevancy of most of the questions concerning which petitioner now complains (Pet. 14–15).[2]

[2] The district court sustained the government's objections to the relevance of petitioner's questions as to the criteria to be applied in determining the tax status of an organization (R. 192–193), as to the definition of a "sensitive case" (R. 185), as to whether the tax investigation was prompted by Con-

These judicial rulings on the relevancy of his desired discovery topics were not assigned as error in the court below or in the petition for certiorari.

Furthermore, the court of appeals reviewed the probability that further discovery would have strengthened petitioner's challenges to the summons. It concluded that no improper purpose would be established merely by demonstrating that a Congressional committee had a lively interest in the abuse of tax exempt status by organizations such as ABC and desired to be informed of the results of a tax investigation, or that such an investigation was under close scrutiny by top level Internal Revenue Service personnel (Pet. 30–33).

A district court has discretion to limit discovery in a proceeding to enforce an Internal Revenue Service summons. *Venn* v. *United States*, 400 F. 2d 207, 212 (C.A. 5); *United States* v. *Benford*, 406 F. 2d 1192, 1194 (C.A. 7). In view of the strength of the government's showing that a legitimate tax purpose was being pursued, and petitioner's failure to establish the probable existence of any appropriate challenges to the summons which might be developed through additional discovery, the court did not abuse its discretion in denying a continuance. Moreover, there is a

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gressional investigating activity (R. 185–186), as to whether Special Agent Cornue conferred with his superiors in Washington, D.C. (R. 186), as to the Agent's knowledge of conversations between his immediate superior and an investigator for the "Wright Patman Committee" (R. 187–188), as to whether Agent Cornue discussed his investigation with a newspaper reporter (R. 189), and whether Agent Cornue had discovered or interviewed any members of ABC (R. 189).

recognized need for prompt disposition of summons enforcement proceedings such as this. *United States* v. *McDonald*, 313 F. 2d 832, 835 (C.A. 2); *In re Magnus, Mabee & Reynard, Inc.*, 311 F. 2d 12, 16 (C.A. 2), certiorari denied, 373 U.S. 902; *Federal Maritime Comm.* v. *New York Terminal Conference*, 373 F. 2d 424, 426, fn. 2 (C.A. 2); *Chapman* v. *Goodman*, 219 F. 2d 802, 804–807 (C.A. 9).

2. There is no merit to petitioner's contention (Pet. 19–22) that it was a denial of due process for the district court to strike, after the hearing, the three affirmative defenses (R. 21, 140, 151)[*] which petitioner pleaded in his answer to the petition. As the court of appeals noted (Pet. 28), petitioner failed to offer any evidence to support the affirmative defenses, although he had ample opportunity to do so. Thus, the court of appeals correctly concluded that, in view of petitioner's failure of proof, it was "immaterial whether the defenses were properly stricken under Rule 37 or otherwise * * *" (Pet. 28).

[*] These three affirmative defenses were (1) that ABC was exempt from federal taxation (2) that the United States and the Special Agent had violated unspecified rights of petitioner and ABC under various provisions of the United States Constitution, and (3) that the United States and the Special Agent "have embarked on a course of action calculated to harass and embarrass Respondent Robert D. Hayes, Americans Building, Constitutionally, and the members thereof * * *" (R. 21).